

HON. MR. JUSTICE BRITTON:—About 10 o'clock on the evening of the accident, the deceased went, with others, from the boarding cars to the pay car, where deceased received a check for his work. On his way back from the pay car to the boarding car, deceased, walking easterly, instead of walking upon the way or space between the main line track and the boarding cars, walked upon the track, between the rails. The deceased was not invited to do this, was not told to do it, and, so far as appears, no permission had been given. The night was dark, and probably the walking was easier between the rails than upon the space mentioned. While so walking, the deceased was struck by a ballast train moving westerly, and so injured that death resulted a short time after. The ballast train which struck the deceased was being moved by a locomotive at the rear end of the train pushing it. Negligence is charged, in that no warning was given to the workmen of the approach of the gravel train, nor was the train provided with a head light or any light, nor was any bell sounded. Negligence, by way of omission of alleged duty, and by negligent acts committed, is charged in almost every possible way.

This action is not against the railway company, but against the construction company, and the defendant's admission was put in, that the train which struck the deceased was under the control of, and operated by, the defendants.

I assume that the defendants are not admitting, and are not in fact, under any greater liability in operating trains under arrangement with the railway company than the railway company would be if deceased had been working for the railway company and the railway company had been operating its own trains.

At the close of the case, the counsel for defendants moved for dismissal of action. I reserved my decision, and submitted the following questions to the jury, and asked the jury to assess the damages contingent upon plaintiff's right to recover.

"1. Were the defendants guilty of any negligence which caused the accident to the deceased Antonio Andriola?
A. Yes.

2. If so, what was the negligence? A. Not sufficient light on the leading car and not enough precaution taken when approaching the boarding cars.